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Choin v. Mukasey: The Road to Permanent Residency through U.S. Citizen Marriage & Divorce

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Cover Page Footnote

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[1] 537 F.3d 1116 (9th Cir. 2008).

I. Introduction

Every year, millions of nonimmigrants arrive in the United States for various reasons.[2] Under U.S. immigration laws, there are several methods by which foreigners can enter the United States and stay permanently.[3] One such method is for an alien to marry a U.S. citizen or permanent resident.[4] For purposes of remaining permanently in the United States after marriage, the alien must file an application to adjust his or her status[5] "as a result of the marriage."[6] Congress did not provide guidelines on how to interpret the "as a result of marriage" language in the immigration statute; however, in 2008, the Ninth Circuit Court of Appeals declared in *Choin v. Mukasey* that an alien whose marriage dissolves prior to being granted permanent residency may still be eligible to adjust their status.

This Note will discuss and analyze *Choin*. Part II of this Note will provide a brief overview of *Choin*, concentrating on the relevant facts, procedural history, and the court's holding and reasoning. Part III will lay out the relevant background law for understanding the *Choin* decision. Part IV will analyze the *Choin* decision, paying particular attention to deference, statutory amendments and statutory interpretation. Part V of this Note will conclude that *Choin* was decided correctly but will also discuss the potential consequence of the decision: the opening up of the possibility for an increase in marriage-based immigration fraud. Additionally, this Note will draw attention to the fact that the decision could have a broader reach than anticipated by the Ninth Circuit.

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2 "During 2007, there were 171 million nonimmigrant admissions to the United States according to DHS workload estimates." MACREADIE BARR, KELLY JEFFERYS, & RANDALL MONGER, DEPT. OF HOMELAND SEC., NONIMMIGRANT ADMISSIONS TO THE UNITED STATES: 2007, at 1 (2008).

3 *See generally* 8 C.F.R. § 214 (2008) (discussing nonimmigrant admission, extension and maintenance of status).

4 *See* 8 U.S.C.S. § 1255(d) (2007).

5 "Adjustment of Status is a special benefit allowing a person to obtain permanent residency without having to travel abroad and be readmitted with an immigrant visa." RICHARD A. BOSWELL, ESSENTIALS OF IMMIGRATION LAW 76 (AILA Publications, 2nd ed., 2009) (2006).

6 *See id.*

II. Statement of the Case

A. Facts

Yalena Choin (Choin), a Russian citizen, entered the United States on a fiancée visa with her two children on December 4, 1998.[7] She was engaged to Albert Tapia, a U.S. citizen, and married him on February 20, 1999.[8] Choin then filed to adjust her status to a lawful permanent resident on April 10, 1999 based on her marriage.[9] While Choin's application was pending and she was waiting for her interview with the Immigration and Naturalization Service (INS),[10] Choin and her husband divorced.[11] The divorce occurred "five days short of two years from the date [she] filed her application."[12] The INS rendered a decision on Choin's application on August 21, 2001 and denied her application to adjust her status to a lawful permanent resident.[13]

B. Procedural History

The Department of Homeland Security initiated removal proceedings against Choin, and an Immigration Judge ordered that Choin be removed.[14] Choin subsequently appealed to the Board of Immigration Appeals (BIA).[15] The BIA denied Choin's appeal,

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7 Choin v. Mukasey, 537 F.3d 1116, 1117 (9th Cir. 2008).

8 *Id.* at 1118.

9 *Id.*

10 "On March 1, 2003, the INS ceased to exist as an independent agency within the Department of Justice, and its functions were transferred to the newly formed Department of Homeland Security." *Id.* at 1118 n. 2 (quoting Homeland Security Act of 2002, Pub. L. No. 107-296, §§ 441, 471, 116 Stat. 2135, 2192, 2205 (codified at 6 U.S.C. § 101, et seq.)).

11 *Choin*, 537 F.3d at 1118.

12 *Id.*

13 *Id.*

14 *Id.*

15 The Board of Immigration Appeals is the highest administrative tribunal on immigration and nationality matters in the United States. The Board is responsible for applying the immigration and nationality laws uniformly throughout the United States. Accordingly, the Board has been given nationwide jurisdiction to review the orders of Immigration Judges and certain decisions made by the Department of Homeland Security (DHS), and to provide guidance to the Immigration Judges, DHS, and others through published decisions. 8 C.F.R. § 1003.1(d)(1) (2008).

using the same reasoning as the Immigration Judge.[16] Both reasoned that Choin was ineligible to adjust her status to a permanent resident under 8 U.S.C.S. § 1255(d),[17] because she had divorced her U.S. citizen husband prior to her case being adjudicated.[18] Choin sought review of the BIA's holding from the Ninth Circuit Court of Appeals.[19]

On appeal to the Ninth Circuit, the government argued that Choin was ineligible based on the language of the statute governing adjustment of status.[20] The government explained her ineligibility on the basis that she had divorced her U.S. citizen husband before the INS had adjudicated her application for adjustment of status.[21] The court held that both the government and BIA's interpretation of the statute was contrary to legislative intent and that there was no durational element requirement in the statute.[22] Thus, the court concluded that the BIA had incorrectly ruled against Choin and held that she should be given a fair adjudication of her adjustment of status application.[23]

C. Holding

After laying out the necessary statutory framework for analyzing fiancé(e) immigration and adjustment of status applications, the court began its opinion by concentrating on, and interpreting, the "as a result of the marriage of the nonimmigrant" language in the Immigration and Nationality Act (INA) § 245(d).[24]

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16 *Choin*, 537 F.3d at 1117.

17 [T]he Attorney General may not adjust . . . the status of an alien lawfully admitted to the United States . . . except to that of alien lawfully admitted to the United States on a conditional basis . . . as result of marriage of the nonimmigrant to the citizen who filed the petition to accord the alien's nonimmigrant status.

8 U.S.C.S. § 1255(d) (2007) (internal citations omitted).

18 *Choin*, 537 F.3d at 1118.

19 *Id.*

20 *Id.*

21 *Id.*

22 *Id.* at 1120-21.

23 *Id.* at 1121.

24 The Attorney General may not adjust . . . the status of a [K visa holder] except to that of an alien lawfully admitted to the United States on a conditional basis under section 1186(a) of this title *as a result of the marriage of the nonimmigrant* . . . to the citizen who filed the [K visa petition].

The court announced that the statute was ambiguous and thus did not "definitively resolve the eligibility of a petitioner in Choin's circumstances."[25] The court noted that the language in the statute could be interpreted in two ways: 1) As meant to impose a durational requirement by excluding alien spouses whose marriages no longer exist at the time the immigration officer renders a decision on their application; or 2) that the application at the time it is reviewed must be based on the fact of marriage.[26]

The court then analyzed the level of deference to accord the agency's interpretation of the statute.[27] It rejected the government's argument that the court should apply *Chevron* deference[28] and adopt the BIA's interpretation of the statute, and instead cited a precedent which declared that unpublished BIA decisions were not afforded *Chevron* deference.[29] Rather, unpublished BIA decisions would be afforded *Skidmore* deference.[30] The Ninth Circuit, in applying *Skidmore* deference to the BIA's decision, explained that the BIA had not issued a thorough explanation for its decision to deny Choin's application.[31] Thus, to determine the strength of the two varying interpretations of the statute, the Ninth Circuit looked at the purpose of the statute as part of a broader statutory framework.[32]

The Ninth Circuit acknowledged the Immigration Marriage Fraud Amendments' (IMFA)[33] goal of deterring marriage fraud for

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8 U.S.C.S. § 1255(d) (2007) (emphasis added).

25 *Choin*, 537 F.3d at 1119.

26 *Id.* at 1120.

27 *Id.*

28 *See* Chevron U.S.A., Inc v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842 (1984). The *Chevron* Court announced that the two questions for statutory interpretation analysis were: 1) Whether Congress has spoken to the precise legal issue; and 2) If not, whether the agency's construction is permissible. *See id.* at 863-67.

29 *Choin*, 537 F.3d at 1120 (citing Garcia-Quintero v. Gonzales, 455 F.3d 1006, 1012 (9th Cir. 2006)).

30 *See* Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944). Findings of an administrative agent which are not controlling on the courts are given a certain level of deference which would "depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements and all factors which give it power to persuade, if lacking power to control." *See id.* at 139-40.

31 *See id.*

32 *See id.*

33 Immigration Marriage Fraud Amendments of 1986, 8 U.S.C. §§ 1184(d), 1186a

immigration purposes.[34] According to the court, the government's interpretation of the statue, which required an ongoing marriage at the time of INS adjudication, contravened the purpose of the IMFA.[35] The court explained that Congress had amended the statute to allow alien spouses to adjust their status to conditional permanent residents for the first two years of marriage.[36] The court also opined that Congress could have imposed a durational requirement but had not done so.[37]

The Ninth Circuit further discussed analogous cases in which the court had ruled against the government's proposed interpretation.[38] In *Freeman v. Gonzales*,[39] a woman whose husband had died after she filed her adjustment of status application was eligible to adjust her status.[40] The court reasoned that even though immigration officers may need time to review and process applications, an alien's adjustment of status application cannot depend on when DHS happened to reach the pending application.[41] The Ninth Circuit therefore held that "the purpose and context of § 245(d) [did] not support the government's reading of the statute that requires the automatic removal of immigrants, whose marriages end in divorce while their application for adjustment of status languishes in the agency's file cabinet."[42] However, as in *Freeman*, the fact that Choin's marriage was based on good faith did not automatically entitled her to permanent resident status.[43] Rather, the purpose of the court's ruling was "to ensure that in making the decision to accord [adjustment of] status, the immigration authorities are properly construing the law."[44]

(2007).

34 *Id.*

35 Choin v. Mukasey, 537 F.3d 1116, 1121 (9th Cir. 2008).

36 *Id.*

37 *Id.*

38 *Id.* (citing Freeman v. Gonzales, 444 F.3d 1031 (9th Cir. 2006)).

39 444 F.3d 1031(9th Cir. 2006). *See infra* notes 85-101 and accompanying text.

40 *Id.*

41 *Choin*, 537 F.3d at 1121.

42 *Id.*

43 *Id.* at 1121 n.5.

44 *Id.* (citing *Freeman*, 444 F.3d 1031).

III. Background Law

A. Alien Marriage and U.S. Immigration: Statutory Framework

The U.S. immigration laws have a long-standing tradition of reuniting families.[45] In light of this, an alien can travel to the United States as the fiancé(e) of a U.S. citizen if the Consular officer in the alien's home country issues a K fiancé(e) visa.[46] A U.S. citizen, who is the fiancé(e) of an alien, must file a petition in the United States for the alien who is applying for a fiancé(e) visa.[47] The U.S. citizen petitioner must make a showing that the parties have previously met in person within two years before the date of filing the petition, have a bona fide intention to marry, and are "legally able and actually willing to conclude a valid marriage in the United States within a period of ninety days after the alien's arrival."[48] The alien and the U.S. citizen fiancé(e) must marry within three months of the alien's arrival in the United States, or else the alien and any minor children are required to leave the country.[49]

After the marriage of the alien and the U.S. citizen, the alien becomes eligible to adjust her status to a conditional permanent resident.[50] Within ninety days of the two-year anniversary of gaining conditional permanent resident status, the couple can jointly petition to have the non-citizen's conditions removed.[51] The couple must show that they are still married and that they did

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45 *See Fraudulent Marriage and Fiance Arrangements To Obtain Permanent Resident Immigration Status: Hearing Before the S. Comm. on the Judiciary*, 99th Cong. 1-3 (1986) (statements of Sens. Alan Simpson and Paul Simon (explaining that the United States immigration system is founded on the principle of family reunification, and most importantly, spousal reunification)).

46 *See Choin*, 537 F.3d at 1118 (discussing the steps by which an alien spouse can become a permanent U.S. resident).

47 8 U.S.C. § 1184(d)(1) (2007).

48 *Id.*

49 *See id. But see* Moss v. Immigration & Naturalization Service, 651 F.2d 1091 (5th Cir. 1981) (holding that a two day delay in the marriage of a U.S. citizen and an alien due to extraneous circumstances should not be a basis on which to deny alien adjustment application; rather the immigration judge must determine the cause for the delay).

50 8 U.S.C. § 1255(d) (2007).

51 *See* 8 U.S.C. § 1186a(c)(1)(A) (2007).

not enter into marriage for immigration purposes.[52] If the marriage ends before the couple can file the petition, then the non-citizen must apply for a waiver of the petition requirement by attesting that it was a bona fide marriage which was entered into in good faith.[53] An alien who holds a nonimmigrant visa that is revoked becomes removable under 8 U.S.C. § 1227(a)(1)(b), and an immigration judge may order the alien's removal.[54]

B. Alien Marriage and U.S. Immigration: BIA Decisions & Case Law

1. Matter of Boromand: Status of Marriage at the Time of Adjustment (Nonviability vs. Legal Termination)

In a 1980 BIA decision, *Matter of Boromand*,[55] the court held that an alien's petition for permanent residence based on marriage to a U.S. citizen could be rejected because the "marriage upon which [the] visa petition was based has been legally terminated."[56] In *Boromand*, an Iranian citizen entered the United States as a nonimmigrant student on January 10, 1973.[57] Approximately seven months later, on August 8, 1973, he married a U.S. citizen in Chicago, Illinois.[58] His wife filed a relative visa petition on his behalf and, based on his marriage, his status was adjusted to lawful permanent resident on August 7, 1974.[59]

The alien was subsequently notified that his adjustment of status decision would be rescinded on March 11, 1975.[60] The immigration judge based his decision on that fact that the alien and his U.S. citizen wife, although lawfully married, did not reside in the same house at the time Boromand's adjustment of status was

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52 *See* 8 U.S.C. §1186a(d)(1)(A)(i) (2007).

53 *See* 8 U.S.C. §1186a(c)(4) (2007).

54 *See* Choin v. Mukasey, 537 F.3d 1116, 1117 (9th Cir. 2008) (Immigration Judge ordered alien spouse removed because her adjustment of status application is denied). *See also* Ibragimov v. Gonzales, 476 F.3d 125, 128 (2d Cir. 2007) (BIA orders removal for an alien who arrived in the country after overstaying during his previous visit).

55 17 I. & N. Dec. 450, 454 (B.I.A. 1980).

56 *Id.* at 453-54.

57 *Id.* at 450.

58 *Id.*

59 *Id.* at 450-51.

60 *Id.* at 451.

granted.[61] Additionally, during his adjustment of status interview, the alien had represented himself inaccurately by telling the immigration officer that he resided with his wife.[62] The immigration judge therefore concluded that Boromand was not eligible to adjust his status to a permanent resident based on his misrepresentations.[63]

During the appeals process, the BIA discussed the case of *Matter of Sosa*,[64] a case which "addressed the issue of separation and marriage viability and its relationship to an adjustment of status application."[65] The BIA explained that in *Sosa*, the statute was construed as requiring that joint petitioners establish a bona fide marriage that is "viable and ongoing."[66] The BIA then announced that it was overruling *Sosa* to the extent that it "holds that an alien seeking admission to the United States as the spouse of the United States citizen or lawful permanent resident may be excluded solely because the marriage upon which is based is 'nonviable.'"[67] However, the BIA defined "nonviability" to mean "factually dead" and noted that legal termination of marriage would still be a basis for the denial of an adjustment of status application.[68]

Furthermore, Boromand had made several misrepresentations, the BIA reasoned that his marriage to the U.S. citizen spouse was bona fide and explained that the misrepresentations about his living arrangements were not material because an adjustment of status application cannot be denied solely on the basis of the nonviability of a marriage at the time of adjustment.[69] Thus, in the present case, the alien's adjustment of status could not be rescinded on that basis.[70]

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61 *See In re* Matter of Boromand, 17 I. & N. Dec. at 451.

62 *Id.* at 451.

63 *Id.*

64 15 I. & N. Dec. 572 (B.I.A. 1976).

65 *In re* Matter of Boromand, 17 I. & N. Dec. at 452.

66 *Id.* at 453.

67 *Id.*

68 *Id.* at 454 (quoting Dabaghian v. Civiletti, 607 F.2d 868, 870n.1 (9th Cir. 1979)).

69 *Id.* at 454-55.

70 *Id.*

2. *In re Lenning: Effect of Legal Separation on Adjustment of Status*

The BIA addressed how a legal separation would affect an adjustment of status application in the case of *Lenning*.[71] A U.S. citizen filed a petition on behalf of his alien spouse for adjustment of status based on their marriage on July 13, 1974.[72] On September 27, 1979, the couple executed a separation agreement which settled all rights between them including financial and property rights.[73] The U.S. citizen filed a petition on his wife's behalf after the separation agreement on October 16, 1979.[74] The District Director denied the petition on February 21, 1980, and the U.S. citizen appealed.[75] The petitioner argued that based on the reasoning in *Chan v. Bell*,[76] although they were separated, his spouse was still eligible to adjust her status because the marriage was entered into good faith and was still "legally unterminated."[77]

The BIA explained that previous BIA decisions had attempted to use a "viability" test to determine whether a couple's marital relationship should be the basis to approve or reject an application.[78] The BIA noted it had expressly overruled that test and observed in *Chan* that "where parties enter into a valid marriage, and there is nothing to show that they have since obtained a legal separation or dissolution of that marriage, a visa petition filed on behalf of the alien spouse should not be denied solely because the parties are not residing together."[79] The BIA distinguished *Lenning*, however, because there was a valid legal separation.[80]

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71 *In re* Lenning, 17 I. & N. Dec. 476, 476 (B.I.A. 1980).

72 *Id.*

73 *Id.*

74 *Id.*

75 *Id.*

76 "'There is no requirement that a marriage, entered into in good faith, must last any certain number of days, months or years. Much less is there any requirement that a bona fide and lasting marital relationship . . . exists as of the time the INS questions the validity of the marriage.'" Chan v. Bell, 464 F.Supp. 125, 129 (D.D.C. 1978) (emphasis omitted) (quoting Whetstone v. I. & N., 561 F.2d 1303, 1306 (9th Cir. 1977)).

77 *In re* Lenning, 17 I. & N. Dec. at 476.

78 *Id.* at 477.

79 *Id.* (emphasis omitted).

80 *Id.*

Because both of the spouses were residents of New York, the BIA analyzed a New York law that allowed a couple with a valid separation agreement to sue each other for a divorce after one year on the basis of the separation agreement.[81] The BIA pointed out that in New York, the separation agreement entered into by the couple is more similar to that of a legal separation agreement since either party could seek a divorce based on the agreement.[82] The dissent, however, charged that "[t]he premise on which the Board's interpretation rests, that people who execute separation agreements are set irreversibly on a permanent course away from each other is unsound."[83] Nevertheless, the BIA ultimately held that the separation agreement was similar to a divorce decree, and therefore the District Director had correctly denied the U.S. citizen's spouse visa petition.[84]

3. *Freeman v. Gonzales: Death of U.S. Citizen Spouse Before Adjustment of Status Decision*

Another relevant precedent is the Ninth Circuit's decision in *Freeman v. Gonzales*. Carla Freeman was a dual citizen of South Africa and Italy.[85] While in the United States, she met and married a U.S. citizen, Robert Freeman.[86] After the marriage, she returned to South Africa and subsequently returned to the United States in June 2001 under the terms of a special Visa Waiver Program[87] which granted her a ninety-day visitor stay in the country.[88] Before the expiration of her visa waiver, her husband filed a petition on her behalf, and she filed an application to adjust

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81 *Id.* at 478.

82 *Id.*

83 *In re* Lenning, 17 I. & N. Dec. at 480 (Farb, J., dissenting).

84 *Id.* at 479 (majority opinion).

85 Freeman v. Gonzales, 444 F.3d 1031, 1032 (9th Cir. 2006).

86 *Id.*

87 *See id.* at 1032 n.1 (citing 8 U.S.C. §§ 1187, 1255(c)(4)) ("The Visa Waiver Program (VWP) authorizes citizens of certain enumerated countries, including Italy, one of Mrs. Freeman's countries of citizenship, to enter the United States without a visa for a term no longer than 90 days. In exchange for this procedural benefit, VWP entrants waive their right to challenge any removal action other than on the basis of asylum (the no-contest clause). They are, however, allowed to seek adjustment of their status by filing an immediate relation petition.")

88 *Id.*

her status to that of a lawful permanent resident.[89] Her husband died while her application was pending.[90]

In May 2004, when her application was finally reviewed, the Immigration Officer ruled that Freeman could no longer be considered a "spouse"[91] for purposes of adjusting her status and ordered her to leave the country.[92] Additionally, because she was subject to provisions of the Visa Waiver Program, she could neither renew her application for adjustment of status nor seek review of the decision by an immigration judge.[93] Freeman petitioned the Federal District Court for a writ of habeas corpus.[94] She asserted that the Immigration Officer's ruling that she was no longer a "spouse" and therefore ineligible to adjust her status to permanent was erroneous.[95] She also challenged the Immigration Officer's findings that she had waived any right of review.[96] The district court denied her petition, and she appealed to the Ninth Circuit Court of Appeals.[97]

The Circuit Court analyzed the statutory interpretation of the word "spouse" as it pertains to adjustment of status under immigration laws.[98] The court in its analysis considered other sections of the statute and indicated that Congress had explicitly introduced a durational requirement in other parts of the statute but had not done the same in the part of the statute where the word "spouse" appears.[99] The Ninth Circuit therefore concluded that there was no durational element needed to satisfy the "spouse" requirement in the statute.[100] Thus, Freeman was eligible as the spouse of a U.S. citizen to file an adjustment of status

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89 *Id.* at 1033.

90 *Id.* at 1032.

91 An alien must have been the spouse of a U.S. citizen for at least two years at the time of the U.S. citizen's death. Mr. Freeman died shortly before the couple's first wedding anniversary. *See* 8 U.S.C.S. §1151(b)(2)(A)(i) (2008).

92 *See Freeman*, 444 F.3d at 1033.

93 *Id.*

94 *Id.*

95 *Id.*

96 *Id.*

97 *Id.*

98 *Freeman*, 444 F.3d at 1037-38.

99 *Id.* at 1037-43.

100 *Id* at 1043.

application.[101]

C. *Deference to an Agency's Unpublished Opinion*

Federal courts normally grant deference to agency actions as long as the agency's action is in line with a specific intent of Congress expressed in a statute.[102] In the context of immigration decisions, courts have taken different stances when faced with the question of how much deference to afford a BIA decision.[103] An analysis of some of these decisions is therefore necessary.

1. *Ninth Circuit*

Pedro Garcia-Quintero entered the United States from Mexico in 1986 and resided in the country for twenty years.[104] He married a lawful permanent resident and was accepted into the Family United Program (FUP) in 1993.[105] In 1998, he became a permanent resident.[106] Garcia-Quintero received a Notice to Appear in Removal Proceedings in June 2001 because he attempted to smuggle an illegal alien into the United States.[107] Based on his testimony during the removal proceedings, the Immigration Judge held that he had knowingly participated in smuggling an illegal alien into the United States and was therefore

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101 *Id.*

102 *See generally* Kimberly J. Rice, Delegation, Deference and Doctrine: Re-evaluating the Federal Courts' Relationship with Federal Administrative Agencies (Apr. 2, 2009) (unpublished Ph.D. dissertation, Univ. of Wisconsin-Milwaukee) (discussing Chevron U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837 (1984), and noting that courts usually defer to agency decisions).

103 *See, e.g.*, Rotimi v. Gonzales, 473 F.3d 55, 57-58 (2d Cir. 2007) (holding that an unpublished BIA decision that does not rely on precedent for its definition of an ambiguous phrase does not receive *Chevron* deference, because it is not "promulgated under [the BIA's] authority to make rules carrying the force of law . . . " (internal quotation marks omitted)); *see also* Garcia-Quintero v. Gonzales, 455 F.3d 1006, 1012-14 (9th Cir. 2006) (opining that an unpublished BIA decision which does not have the force of law would not receive *Chevron* deference).

104 *Garcia-Quintero*, 455 F.3d at 1009.

105 *See id.* ("The FUP permits qualified alien spouses or unmarried children of legalized aliens, who entered the United States before 1988 and have continuously resided in the United States since that time, to apply for the benefits of the program, which include protection from deportation and authorization to work in the United States.")

106 *Id.* at 1010.

107 *Id.*

removable.[108] Garcia-Quintero appealed to the BIA.[109]

While his appeal was pending, Garcia-Quintero also filed a motion to remand his case to Immigration Court so that an Immigration Judge could consider his application for cancellation of removal.[110] He argued that he was eligible for cancellation of removal because his acceptance into the FUP qualified as "admitted in any status"[111] per the language of the statute.[112] The BIA denied his appeal and, in the process, rejected his argument that he was "admitted in any status" based on his acceptance into the FUP.[113] He subsequently petitioned for review to the Ninth Circuit Court of Appeals.[114]

The Ninth Circuit asked "whether [the court] should accord the BIA's decision... deferential review prescribed by the Supreme Court" in *Chevron*.[115] The court elucidated that *Chevron* deference only applied when the agency's interpretation carries the "force of law."[116] The court noted that the Supreme Court in *INS v. Aguirre-Aguirre*[117] had applied *Chevron* deference to an unpublished BIA decision only after finding that the BIA acted within a statutory power conferred by Congress through the Immigration and Naturalization Act (INA). The court also explained that *Mead*[118] placed limits on *Chevron* deference and its

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108 *Id.*

109 *Id.*

110 *Garcia-Quintero*, 455 F.3d at 1010-11 (2006).

111 8 U.S.C. § 1229(b)(a) (2006) ("Cancellation of removal is available, at the Attorney General's discretion, for an LPR who is inadmissible or deportable if he: 1) has been an alien lawfully admitted for permanent residence for not less than 5 years, 2) has resided in the United States continuously for 7 years after having been admitted in any status, and 3) has not been convicted of any aggravated felony.").

112 *Garcia-Quintero*, 455 F.3d 1006, 1011 (2006).

113 *Id.*

114 *Id.*

115 *Id.*

116 *See id.* at 1012.

117 526 U.S. 415, 424 (1999).

118 United States v. Mead Corp., 533 U.S. 218, 226-27 (2001) (holding that United States Customs Service ruling letters should not be given *Chevron* deference because the statute that grants Customs the power to issue ruling letters "gives no indication that Congress meant to delegate authority to Customs to issue classification rulings with the force of law.").

applicability to an agency's interpretation of statutes.[119] Based on *Mead*, "the essential factor in determining whether an agency action warrants *Chevron* deference is its precedential value."[120] The court explained that the BIA decision lacked precedential value because "a case must be decided by a three-member panel if it presents [t]he need to establish a precedent construing the meaning of laws, regulations, or procedures."[121] In this case, only one member of the panel had rendered the decision.[122]

The court then announced that *Skidmore* deference was the proper level of deference to accord a non-precedential BIA decision.[123] The court analyzed the BIA's interpretation of "admitted in any status" by looking at various sections of the statute and determining whether the phrase appeared in other sections.[124] The court also looked at other circuit court decisions that addressed the issue and concluded that the FUP qualified under the "admitted in any status" language found in the statute, and therefore granted Quintero's petition for review of his cancellation of removal claim.[125]

2. *Second & Eighth Circuits*

In *Ucelo-Gomez v. Gonzales*,[126] the Second Circuit left open the question on whether it would afford a non-precedential BIA decision *Chevron* deference.[127] In *Ucelo-Gomez*, the BIA affirmed

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119 Garcia-Quintero v. Gonzales, 455 F.3d 1006, 1012 (2006).

120 *Id.* (quoting Miranda Alvarado v. Gonzales, 449 F.3d 915, 922 (9th Cir. 2006)). *See also* High Sierra Hikers Ass'n v. Blackwell, 390 F.3d 630, 648 (9th Cir. 2004) ("refusing to accord Chevron deference when the agency was not acting in a way that would have precedential value for subsequent parties") (internal quotation marks omitted).

121 *Garcia-Quintero*, 455 F.3d at 1013 (quoting CFR § 1003.1(e)(6)(ii) (2007)).

122 *Id.* at 1012; *see also* Board of Immigration Appeals, *Practice Manual* (2004), *available at* http://www.justice.gov/eoir/vll/qapracmanual/pracmanual/chap1.pdf ("[A] single Board Member decides cases *unless* the case falls into one of six categories that require a decision by a panel of three Board Members [such as] the *need to establish a precedent* construing the meaning of laws, regulations or procedures.") (emphasis added).

123 *See Garcia-Quintero*, 455 F.3d at 1014.

124 *Id.* at 1018.

125 *Id.* at 1015-20.

126 464 F.3d 163 (2d Cir. 2006).

127 *Id.* at 167.

an immigration judge's determination without an opinion.[128] The Second Circuit remanded the case to the BIA to make a determination of "whether affluent Guatemalans [may] constitute a particular social group within the INA."[129] The Second Circuit also announced that

> when we remand because the BIA has not yet spoken with sufficient clarity, it will often be up to the BIA to decide whether to issue a precedential or non-precedential opinion. And where the former is the case, we (of course) must grant the BIA's responsive opinion Chevron deference, assuming the basic requirements of Chevron are met.[130]

In *Godinez-Arroyo v. Mukasey*,[131] the Eighth Circuit Court of Appeals refused to rule on the issue of how much deference to afford an unpublished BIA decision because, even after applying a lesser level of *Skidmore* deference, the Eighth Circuit found that the BIA's decision was persuasive.[132] The Eighth Circuit, however, noted that it had given unpublished BIA decisions a high level of deference in the past, although a conclusive determination was not made as to whether a sliding scale of deference should be applied. The issue rested on whether the BIA issued a published or an unpublished opinion.[133] The Eighth Circuit also highlighted the fact that the Supreme Court had afforded an unpublished BIA decision *Chevron* deference.[134]

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128 *Id.*

129 *Id.* at 170.

130 *Id.*

131 540 F.3d 848 (8th Cir. 2008)

132 *See id.* at 852 (holding that a Missouri statute under which alien was convicted listed crimes which could satisfy the "moral turpitude" deportation requirement in 8 U.S.C.S. § 1227(a)(2)(A)(i)).

133 *Id.* at 851.

134 In INS v. Aguirre-Aguirre, 526 U.S. 415, 424 (1999), the Supreme Court applied *Chevron* deference to a BIA interpretation and reversed the Ninth Circuit ruling but noted that *Chevron* deference applies to the BIA because of the statutory allocation of power laid out by Congress in the INA. *See id.* at 425. Additionally, the BIA was acting within its authority, because its actions were consistent with statutory provisions. *See id.* at 430-33.

IV. Legal Analysis

A. Choin's Level of Deference to the BIA's Statutory Interpretation is Consistent with Precedent

In *Chevron*, the Supreme Court provided a two-step analysis to determine whether an agency's decision is consistent with the statutory grant upon which the agency is acting.[135] The Court reasoned that if "Congress has directly spoken to the precise question at issue," then the unambiguous language of the statute is controlling and thus agency interpretation will be given deference.[136] In later cases, however, the Court made the distinction that *Chevron* deference was only available when questions are based on the "force of the law."[137] Thus, in *Mead*, the United States Court of Appeals for the Federal Circuit held that the U.S. Custom Service's classification of day planners as diaries, which subjected them to tariffs, was not entitled to *Chevron* deference.[138] The court explained that "there is no indication on the statute's face that Congress meant to delegate authority to Customs to issue classification rulings with the force of law."[139]

In Choin's case, when the Ninth Circuit Court of Appeals was faced with questions of statutory interpretation and how much deference to afford the BIA's interpretation of a statute, the court cited *Garcia-Quintero* and held that "when the BIA advances its interpretation of an ambiguous statute in an unpublished decision, that interpretation is not entitled to *Chevron* deference" because it lacks precedential value.[140] The Ninth Circuit remarked that the

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135 *See* Chevron U.S.A., Inc v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842 (1984).

136 *Id.* at 842.

137 *See, e.g.*, *Skidmore*, 323 U.S. 134, 139 (1944) (holding that opinions by Administrator of the Fair Labor Standards Act does not merit *Chevron* deference); *United States v. Mead*, 533 U.S. 218, 221-22 (2001) (holding that *Chevron* deference will not be applied to United States Customs Service "ruling letters" which interpreted wording in a tariff-setting statute); *Aguirre*, 526 U.S. 415, 430-33 (1999) (holding that a BIA decision which contained a thorough explanation of a statute and carried the force of law should be afforded *Chevron* deference).

138 *Mead*, 533 U.S. at 221-22.

139 *Id.* at 226-27.

140 Choin v. Mukasey, 537 F.3d 1116, 1121 (9th Cir. 2008) (citing Garcia-Quintero v. Gonzales, 455 F.3d 1006, 1012 (9th Cir. 2006)). *See also* Chan v. Reno, 113 F.3d

statutory interpretation at issue did not carry the force of law and was therefore not entitled to *Chevron* deference. The Ninth Circuit thus applied the *Skidmore* guidelines[141] in analyzing how much deference to give the BIA's interpretation.[142] The court emphasized that the BIA decision which denied Choin's petition was limited to two brief paragraphs.[143] Furthermore, the Ninth Circuit announced that its deference to the BIA decision was "based only on the inherent strength of the agency's interpretation."[144] When the BIA rendered its decision, it provided very little detail as to why Choin's petition was refused; therefore, the BIA decision was given little deference.[145] Following the *Skidmore* holding, the court embarked on a de novo review of the BIA's statutory interpretation.[146]

Additionally, although the Second and Eighth Circuits have never addressed the issue on how both courts would rule on the deference issue, the Second Circuit has stated in dicta that decisions which lacked precedential value would not be afforded *Chevron* deference.[147] The Eighth Circuit has applied *Skidmore* deference to an unpublished BIA decision.[148] Additionally, the Supreme Court in *Aguirre* afforded an unpublished BIA decision *Chevron* deference but mentioned that the decision carried the force of law required for *Chevron* deference because the BIA had provided a thorough explanation.[149] The Ninth Circuit distinguished the thorough explanation provided by the BIA in *Aguirre* from the BIA's limited two-paragraph explanation in *Choin*.[150] Consequently, the Ninth Circuit's use of *Skidmore* deference was appropriate in Choin's case.[151]

1068, 1073 (9th Cir. 1997).

141 *See Skidmore*, 323 U.S. at 139-40.

142 *Choin*, 537 F.3d at 1120.

143 *See id.*

144 *Id.*

145 *See id.* at 1120.

146 *Id.* at 1120-21.

147 *See* Ucelo-Gomez v. Gonzales, 464 F.3d 163, 168 (2d Cir. 2006).

148 *See* Godinez-Arroyo v. Mukasey, 540 F.3d 848, 851 (8th Cir. 2008).

149 *See* INS v. Aguirre-Aguirre, 526 U.S. 415, 430-33 (1999).

150 *See Choin*, 537 F.3d at 1120.

151 *See id.*

B. Historical Analysis of Statutes and Amendments are in Accordance with the Ninth Circuit's Interpretation

Historically, U.S. immigration policy has protected the family unit.[152] Under U.S. immigration laws, relatives can petition for "immediate relatives"[153] to be admitted to the country; there is no limit on these types of petitions.[154] Congress, in 1986, enacted the Immigration Marriage Fraud Amendments "to balance the competing policies of promoting family reunification and preventing marriage fraud."[155]

Prior to the IMFA, a U.S. citizen could file a petition for the alien spouse to be granted permanent residency and the alien spouse would simultaneously file an application to adjust his or her status to a permanent resident.[156] Based upon the petition and an interview, the immigration officer made an initial determination whether the facts in the petition were true and subsequently approved or rejected an adjustment of status application.[157] If approved and the alien spouse became a permanent resident, the alien spouse was eligible to become a naturalized U.S. citizen in three years.[158] No further inquiry was made into the legitimacy of the marriage and thus if two parties in a fraudulent marriage made it through both the petition and interview phase, they became insulated from any further investigation unless one party voluntarily reported the marriage fraud to immigration authorities.[159] "The Act itself contain[ed] no statutory definition of "marriage" that would aid an [immigration officer] in evaluating a marriage under immigration law."[160]

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152 *See* James A. Jones, *The Immigration Marriage Fraud Amendments: Sham Marriages or Sham Legislation*, 24 FLA. ST. U. L. REV. 679, 680 (1997).

153 "[T]he children, spouses and parents of a citizen of the United States. . . ." 8 U.S.C.S § 1151(b) (2007).

154 *See* Jones, *supra* note 152, at 680.

155 *See id.* at 681. *See also* Immigration Marriage Fraud Amendments of 1986, 8 U.S.C. §§ 1184(d), 1186a (2007).

156 *See* Vonnell C. Tingle, *Immigration Marriage Fraud Amendments of 1986: Locking In by Locking Out?*, 27 J. FAM. L. 733, 736 (1989).

157 *Id.* at 736.

158 *Id.*

159 *Id.*

160 *Id.*

> One of the major problems confronting Congress in amending the Act to deter immigration marriage fraud was to ensure there would be no corresponding infringement upon the rights of law abiding spouses. A provision that deterred sham marriages but simultaneously crippled honest marriages would not be in keeping with the overall purpose of family reunification. With this in mind, Congress passed the Amendments that establish a deterrent in a two year conditional requirement.[161]

Congressional hearings emphasized that Congress and immigration officers were concerned with persons who were trying to circumvent the normal process for immigrating to the United States, and thus the amendments were meant to deter these practices.[162]

Post-IMFA, aliens who enter the United States as K visa holders become conditional residents for the first two years of their permanent residency, and both alien and U.S. citizen spouse can file a petition to remove conditions at the end of two years.[163] If the marriage ends before the petition is filed, the alien spouse can "apply for a waiver of the petition requirement by showing that her marriage was entered into in 'good faith' and that the immigrant 'was not at fault in failing' to file the joint petition."[164]

The Ninth Circuit in *Choin* reasoned that the waiver shows that a non-citizen spouse is still given the benefit to show that her marriage was entered into in good faith even though it ended in divorce.[165] The amendment to the statute to include the waiver requirement also shows that Congress did not intend to concentrate on the marriage's failure or success.[166] Thus, the Ninth Circuit accurately proposed that the purpose of the IMFA did not support the government's broad reading of the statute, which automatically makes divorce a basis for the denial of

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161 *Id.* at 740.

162 *See Immigration Marriage Fraud: Hearing Before the Subcomm. on Immigration and Refugee Policy of the Senate Comm. on the Judiciary*, 99th Cong., 1st Sess. 3-22 (1985) (statement of Alan C. Nelson, Comm'r, Immigr. & Naturalization Service).

163 *See* Choin v. Mukasey, 537 F.3d 1116, 1120-21 (9th Cir. 2008).

164 *Id.* (quoting 8 U.S.C.S. § 1186(a)(c)(4)(B) (2007)).

165 *Id.* at 1121.

166 *See id.*

adjustment of status, irrespective of the fact that the marriage was entered into in good faith but ended in divorce.[167]

C. *Post-IMFA: BIA Decisions and Case Law Show a Justifiable Shift in Law, at Least in the Ninth Circuit*

Pre-IMFA, the BIA announced in *Boromand* that divorce could be used as a basis to deny an alien's adjustment of status application.[168] Additionally in *Lenning*, when the BIA was faced with the question of how a legal separation affects an alien's adjustment of status application, the BIA reasoned that legal separation was analogous to a divorce.[169] The BIA therefore ruled that legal separation could also be used as a basis to deny an adjustment of status application.[170]

Post-IMFA, the BIA announced in *Freeman* that an alien spouse's adjustment of status application could not be denied on the basis of the U.S. citizen petitioner's death.[171] Although after the promulgation of the IMFA the BIA did not revisit the issue of whether divorce or legal separation could be used as basis for denying an adjustment of status application, the Ninth Circuit explained that the *Freeman* decision was analogous to Choin's circumstances.[172] The Ninth Circuit reasoned that nothing in the statute indicated Choin's divorce precluded her from adjusting her status to a permanent resident.[173]

The Ninth Circuit also highlighted the importance of s delay in processing contributed to Choin's dilemma. Choin's application was valid when it was submitted and only became invalid because DHS did not render a decision on her application until after two years had passed, by which time she was divorced.[174] Allowing divorce to automatically make petitioners ineligible to adjust their status in such a circumstance undermines and ignores the good faith marriage on which the application was based, as well as the

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167 *See id.* at 1120.

168 *In re* Matter of Boromand, 17 I. & N. Dec. 450, 454 (BIA 1980).

169 *In re* Lenning, 17 I. & N. Dec. 476, 478-79 (BIA 1980).

170 *Id.*

171 Freeman v. Gonzales, 444 F.3d 1031 (9th Cir. 2006).

172 *Choin*, 537 F.3d at 1121 (citing *Freeman*, 444 F.3d at 1031).

173 *Id.*

174 *Id.*

timely filing of the application. It is important to note, however, that the Ninth Circuit appropriately cautioned that Choin was not automatically eligible to adjust her status to a permanent resident.[175] However, she should have the opportunity to have her application considered for adjustment, which would subject her application to the discretion of the Attorney General.[176]

V. Conclusion

Choin v. Mukasey was decided correctly. An analysis of the statutory language as part of a broader immigration scheme and post-IMFA cases show that the statute does not include a durational element requirement. Although neither the Eighth nor the Second Circuit have directly addressed how much deference to afford an unpublished BIA decision, the Ninth Circuit correctly recognized that the BIA decision in *Choin* did not carry precedential weight and therefore was not entitled to *Chevron* deference. Furthermore, although *Boromand* and *Lenning* were not appealed and were therefore the law at the time they were decided, subsequent statutory amendments bolster the notion that Congress's intention was to limit fraudulent marriages, not to make it difficult for aliens with good faith marriages to adjust their status. Additionally, *Choin* recognizes that it is contrary to the purpose of U.S. immigration laws to deny applications based on marriages that were valid when they are filed but have ended in divorce by the time the application is finally received by DHS.

The *Choin* decision may, however, present other issues in the future. *Choin* was not expressly limited to K visa holders. Thus, it may be interpreted to apply to other pending marriage-based adjustment of status cases where divorce takes place prior to the application being reviewed. It may take further litigation in other courts or an amendment by Congress to provide uniformity in the application of the statute. Until then, at least in the Ninth Circuit, the *Choin* decision correctly remains the governing law.

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175 *See id.* at 1121 n.5.

176 *See id.*